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No. 82-3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOINT COUNCIL OF TEAMSTERS NO. 42, AND ITS AFFILIATED LOCAL UNIONS, SALES DRIVERS & DAIRY EMPLOYEES, LOCAL 166; GENERAL TRUCK DRIVERS, LOCAL 235; GENERAL TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL 692; CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 186; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 420; GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL 982; TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 898; TEAMSTERS & WAREHOUSEMEN, LOCAL 381, ALL AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA' TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 87, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

(Cover Continued On Inside Front Cover)

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Intervenor,

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC., ENGINEERING CONTRACTORS ASSOCIATION, INC., SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION,

Respondents.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC., ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Intervenors.

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Intervenor.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review the decision of the Ninth Circuit Court of Appeals, affirming the holding of the National Labor Relations Board ("NLRB") that the status of dump truck owner-operators as independent contractors could not be relitigated pursuant to the doctrines of res judicata and collateral estoppel, where such issue had been fully litigated in a prior action involving the identical parties or their privies?

2. Where the NLRB, the Circuit Courts and the legislative history are all in accord with respect to the interpretation and application of the "construction industry proviso" of Section 8(e) of the National Labor Relations Act, as amended, do those circumstances present an important question

of federal law which needs to be settled by this Court?

3. Where the question of the appropriateness of the NLRB's remedy is already before this Court in a parallel case, and where in the instant case, the matter was merely remanded to the NLRB because of the perceived absence of any rational explanation for the NLRB's remedy decision, is there any need for this Court to duplicate review of the same issue by granting certiorari in this case?

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC., ENGINEERING CONTRACTORS ASSOCIATION, INC., SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION, ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Respondents.

California Dump Truck Owners Association's Response to the Petition For a Writ of Certiorari.

STATEMENT OF THE CASE

Although it is unnecessary to submit a complete re-statement of this case in this response, clarification of certain aspects of the Statement of the Case presented by the Petitioner may be helpful to the Court.

A. Facts of the Case

Essentially there are four basic interests that are represented by the parties to this proceeding. Petitioner (hereinafter "Unions") obviously presents one view. The Associated General Contractors of California, Inc., The Building Industry Association of California, Inc., The Engineering

Contractors Association, Inc. and the Southern California Contractors Association (hereinafter "Employer Associations") represent another interest. The California Dump Truck Owners Association (hereinafter "CDTOA") is not aligned with either the Unions or the Employer Associations and presents the view of the owner-operators. Finally, the National Labor Relations Board (hereinafter "NLRB"), which is charged with responsibility for administration of the National Labor Relations Act, presents the final perspective.

In summary, as the case history recited in the petition for certiorari suggests, the Unions have been engaged in an effort for over a decade to either represent the dump truck owner-operators in California or alternately, to preclude them from the labor market in which they normally operate.

The owner-operators have steadfastly resisted those attempts. The Employer Associations, for their part, have simply been attempting to adopt whatever position they believe will cause the least interference with or potential disruption of their business operations.

In July of 1977 the Employer Associations and the Unions entered into a Master Labor Agreement (hereinafter "MLA"), which in part attempted to regulate the use of dump truck owner-operators in accordance with the Unions' overall objective of forcing them to pay dues and join the Unions. The contract, like all the MLA's was an "8(f) contract." Cf. Associated General Contractors of California, Inc., 220 NLRB 540, 547-48 (1975) (discussed infra). CDTOA filed charges with the NLRB in December 1977, alleging that the MLA was an illegal "hot cargo" agreement

in violation of Section 8(e) of the National Labor Relations Act, as amended (hereinafter "Act"). 29 U.S.C. § 158(e). A complaint was issued and the parties submitted the matter directly to the NLRB upon stipulated facts, which included the record in a prior proceeding before the NLRB involving the same parties. Joint Council of Teamsters No. 42 (Irvine Santa Fe Company), 248 NLRB 808, 811 n.5 (1980), aff'd but remanded as to remedy sub nom., Joint Council of Teamsters No. 42 v. NLRB, 671 F.2d 305 (9th Cir. 1981). (both decisions hereinafter cited to Appendix to the Petition for Certiorari as App. Pet. at __). The NLRB found that in fact the MLA violated Section 8(e) of the Act and after appeals were filed, the Ninth Circuit affirmed the NLRB's findings that the contract was an illegal, "hot cargo" agreement. However, the Court of

Appeals remanded the matter to the NLRB "to fashion a make-whole remedy or to show good cause why a make-whole remedy would not effectuate the purposes of the Act." [Footnotes omitted] App. Pet. at 10. This petition for certiorari followed.

The nature of the work performed by the owner-operators is succinctly described in the Ninth Circuit's Opinion:

> The facts are not in dispute. The dump truck operators haul materials from construction sites to remote dump sites, from "borrow" pits to construction sites, and from one construction site to another construction site. The truck owners spend most of their time on public roads away from the construction site. The only time spent at the construction site is during loading and unloading when the dump truck operator ordinarily remains in his vehicle. See Joint Council of Teamsters No. 42, et al., 248 NLRB 808, 816-17 (1980).

> On these facts, the Board found that the owner-operators are delivery persons, not construction site workers, and therefore their work is not covered by the on-site proviso. That finding is consistent with Board findings in similar cases involving delivery of goods to a construction site. [citation omitted]

App. Pet. at 3. Based upon these findings of fact and the prior litigation in which the owner-operators were determined to be independent contractors and not employees, both the NLRB and the Ninth Circuit concluded that the MLA was in violation of Section 8(e) of the Act.

B. Prior History of Litigation

The case upon which the current petition for certiorari is based has its roots in a series of litigations going back to 1973 before the NLRB and the Ninth Circuit Court of Appeals. In Contractor Members of the Associated General Contractors of California, Inc., 201 NLRB 311 (1973), the NLRB was

presented with a petition for an election to decertify, among others, the same Unions that are parties to the instant case by certain dump truck owner-operators. (The case number assigned to this petition was 21-RD-1008.) The threshold issue, which the NLRB had to decide in that case, was whether or not the owner-operators were employees who could file such a petition. Over a dissent by Member Kennedy, a majority of the NLRB determined that the owner-operators were not independent contractors and therefore, directed an election. Id. See Contractor Members of the Associated General Contractors of California, Inc., 209 NLRB 366 (1974) (Supplemental Decision and Direction of Election).

However, before that election could take place, a new master labor agreement was negotiated between the

Unions and the Employer Associations, which resulted in an unfair labor practice charge filed with the NLRB by the dump truck owner-operators in August of 1974. A complaint was issued and after a hearing the NLRB entered an order against the Employer Associations, finding that they had in fact violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2). Associated General Contractors of California, Inc., 220 NLRB 540 (1975). This decision relied upon the NLRB's earlier determination in the underlying decertification proceeding that the owner-operators were not independent contractors. See 220 NLRB at 547. The decision was appealed to the Ninth Circuit Court of Appeals, which refused enforcement of the NLRB's order. Associated General Contractors of California, Inc. v. National Labor Relations Board, 564 F.2d 271 (9th Cir. 1977).

After a careful review of the underlying NLRB determination in the decertification proceedings, the Ninth Circuit held that the owner-operators were in fact independent contractors and remanded the case to the NLRB for further proceedings not inconsistent with its opinion. Id. at 282. No petition for certiorari was filed by any party and the Unions' petition for rehearing and rehearing en banc was denied on December 30, 1977. Id. at 272.

On remand, the NLRB accepted the Ninth Circuit's determination and concluded "that the owner-operators who drive the trucks herein are independent contractors and not employees." Associated General Contractors of California, Inc., 239 NLRB 686 (1978). Accordingly, the petitions for decertification were dismissed and the prior holdings were vacated. Id. at 687.

In the instant proceeding the Unions have attempted before the Board, before the Ninth Circuit Court of Appeals and now before this Court to relitigate the issue of the independent contractor status of the owner-operators. See App. Pet. at 3, n.3, 31.

ARGUMENT

I. BOTH THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE NINTH CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT CONCUR IN THE NLRB'S DETERMINATION THAT THE OWNER-OPERATORS ARE INDEPENDENT CONTRACTORS WITHIN THE MEANING OF SECTION 2(3) OF THE ACT

The Unions rely upon Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322 (D.C. Cir. 1971), for the proposition that the owner-operators in the instant case have been held to be employees by the District of Columbia

Circuit and that therefore, there is a conflict between the District of Columbia Circuit and the Ninth Circuit's more recent determination that the California dump truck owner-operators are independent contractors. Compare Associated General Contractors of California, Inc. v. N.L.R.B., 564 F.2d 271 (9th Cir. 1977).

In the first instance the record presented to the Ninth Circuit in Associated General Contractors of California, Inc. was not the same record that the D.C. Circuit reviewed in its decision in 1971. Secondly, the D.C. Circuit did not conclude in its decision that the owner-operators were employees. Rather, it simply concluded that, based upon the record before it, it could not displace the NLRB's choice between what appeared to be two fairly conflicting views (employee vs. independent

contractor status). Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d at 1329. In short, the D.C. Circuit indicated its belief that it was a close question and that on the record before it, the Court would not substitute its judgment for that of the NLRB. It should also be noted that there was a vigorous dissent filed in that case by Judge MacKinnon in which he indicated that he believed that on the facts presented the owner-operators were independent contractors. 450 F.2d at 1329-1334.

On a different record, the record generated in Contractor Members of the Associated General Contractors of California, Inc., 201 NLRB 311 (1973), the Ninth Circuit concluded that the NLRB had not chosen between two "fairly conflicting views" as to the dump truck owner-operators' status under the Act.

The Ninth Circuit held that the NLRB was wrong in its determination that the owner-operators were employees and instead held that, based upon the record before it, they were independent contractors. Associated General Contractors of California, Inc. v. NLRB, 564 F.2d at 282. Parenthetically, it is noteworthy that the record from the decertification proceeding in 1973 (Case No. 21-RD-1008) is a part of the record in the instant proceeding. Compare App. Pet. at 22, n.5, with Contractor Members of the Associated General Contractors of California, Inc., 201 NLRB 311 (1973).

Thus, there is no conflict between the two Circuit Courts who have addressed the issue as to whether the California dump truck owner-operators are independent contractors. Rather, on two separate records the two separate Circuit Courts of Appeal came to a dif-

ferent result as to the supportability of the Board's underlying determination on those different records.

Moreover, most recently in Building Material and Dump Truck Drivers Teamsters Local Union No. 36 v. NLRB, 669 F.2d 759 (D.C. Cir. 1981), cert. granted sub nom. Shepard v. NLRB 50 U.S.L.W., 3915 (U.S. May 17, 1982) (No. 81-1627), the D.C. Circuit affirmed the NLRB's determination in a parallel case in San Diego County that the dump truck owner-operators were independent contractors. 669 F.2d at 765. It should be noted that the underlying NLRB decision, sustained by the D.C. Circuit, is based at least in part upon the determination that the California dump truck owner-operators in Associated General Contractors of California, Inc. v. NLRB, 564 F.2d 271 (9th Cir. 1977), were independent contractors and not employees.

Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, 249 NLRB 386, 388 (1980). Accordingly, based upon the recent decisions in both the Ninth Circuit and the D.C. Circuit, there is complete accord between them and with the NLRB that the dump truck owner-operators herein are independent contractors. Hence, there is no conflict between the circuits on this issue.

Finally, it must be noted that the Unions' assertion that it has been somehow denied due process, seems to be based upon an argument that this case presents the first opportunity that the Unions have had to seek resolution of the independent contractor issue. That is incorrect. The Unions were a party in Associated General Contractors of California, Inc. v. NLRB, 564 F.2d 271 (9th Cir. 1977), and to the underlying

decertification proceedings. They fully litigated the issue before the NLRB and the Ninth Circuit. Moreover, as a party, the Unions would appear to have had standing to petition for certiorari in 1977 had they chosen to do so. See 28 U.S.C. § 1254(1).

Finally, the Unions' reliance upon United Insurance Company of America v. NLRB, 272 F.2d 446 (7th Cir. 1959), is misplaced. There, the Seventh Circuit held that a prior NLRB determination of employee status reached in a representative proceeding could not substitute for evidence on such issue in a later unfair labor practice proceeding. Id. at 449. Here, the Unions were not denied the opportunity to submit new evidence. In fact, the Unions stipulated to the facts herein and have agreed that the record in the underlying decertification case "remains unchanged

and applicable to the determination of the owner-operators' present employment status." App. Pet. at 22, n.5.

In short, there is no appropriate ground for the Union to assert that this Court should grant certiorari on the issue whether the owner-operators are independent contractors or not. The determinations of the Ninth Circuit and the D.C. Circuit, as well as that of the NLRB, are now consistent and not in conflict. Review of any aspect of the Ninth Circuit's decision on that issue is neither necessary nor appropriate.

II. THE DEFINITION OF THE PHRASE "THE SITE OF THE CONSTRUCTION" AT SECTION 8(E) OF THE ACT IS NOT "UNSETTLED" AND THE CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

In simple terms, the Unions attempt to assert that the interpretation of the so-called construction industry proviso to Section 8(e) of the Act is a matter that this Court needs to "settle." As is ably illustrated by the citations set forth in the Ninth Circuit's decision, the NLRB, the Circuit Courts of Appeal and the legislative history, all are in accord as to the proper interpretation of that proviso, as it applies to this case. App. Pet. at 3-4.

The Unions argue that because the owner-operators have historically

been covered by successive MLA's the Court should "provide further guidance" because of the alleged congressional intent not to change practices within the construction industry by Section 8(e). The "historical" coverage extended to the owner-operators by successive MLA's to which the Unions refer has always been against the will of the owner-operators and unlawful. This "bootstrap" argument scarcely serves to convert this issue into an important question of federal law that this Court should settle. There is nothing to settle. The Ninth Circuit merely applied the commonly held interpretation of the jobsite proviso to Section 8(e) of the Act.

III. THE QUESTION ON THE MAKE-WHOLE REMEDY IS ALREADY BEFORE THIS COURT

In point of fact, there is no conflict between the two Circuits as to whether the NLRB must provide a make-whole remedy in circumstances such as those presented in Joint Council of Teamsters No. 42 v. NLRB and in Building Material and Dump Truck Drivers v. NLRB, 669 F.2d 759 (D.C. Cir. 1981). Rather, the issue is what constitutes a rational explanation for the NLRB's failure to do so. The D.C. Circuit decision concluded that the NLRB's explanation of its refusal to offer the make-whole remedy to the owner-operators who were forced to join the Union as a condition of obtaining work was a rational explanation and the remedy proffered in that case would effectuate the purposes of the Act. The Ninth Circuit has

disagreed. The D.C. Circuit's determination in Building Material and Dump Truck Drivers Local 36 v. NLRB, 669 F.2d 759 (D.C. Cir. 1981), cert. granted sub nom. Shepard v. NLRB, ___ U.S. ____, 50 U.S.L.W. 3915 (U.S. May 17, 1982) (No. 81-1627), is already before this Court pursuant to a petition for certiorari, which was granted May 17, 1982. Since the Ninth Circuit has merely remanded the same remedy issue to the NLRB for further proceedings, the determination of this Court in Shepard v. NLRB will be dispositive of the issue. To grant certiorari on the same issue already presented in Shepard v. NLRB, with the attendant re-briefing of the same issue and rescheduling of argument would be neither efficient nor in the best interests of a speedy resolution of the question.

IV. CONCLUSION

For the foregoing reasons, the CDTOA respectfully requests that certiorari be denied.

Respectfully submitted,

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